93-588

No. _____

Supreme Court, U.S.
FILED
SEP - 1 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DONALD L. KREN
Petitioner,

vs.

CITY OF SPRINGFIELD, ILLINOIS
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE APPELLATE COURT OF ILLINOIS FOURTH JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

DONALD L. KREN
1632 LOVELAND
SPRINGFIELD, IL 62703
(217) 522-7934

QUESTIONS PRESENTED FOR REVIEW

I. Have not citizen Kren's Rights guaranteed under the Constitution of the United States, Including right to due process, liberty, and equal applicatic.. of the law been denied by proceedings to date?

II. Is not the Illinois Appellate Court's allowance of the City's motion to strike and dismiss "substantive denial" of equal protection of the law, a right protected by the 14th Amendment to the Constitution of the United States?

III. Does this procedural striking of Kren's appeal deny Kren access to the courts on the merits of an appeal in which rights protected by the constitution are to be decided, thus denying to Kren substantive due process.

LIST OF ALL PARTIES WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED

I. Illinois Appellate Court
Fourth Judicial District
Panel Consisting Of:
Judge Frederick S. Green
Judge Carl A. Lund
Judge Robert J. Steigmann
Supreme Court Building
Springfield, Illinois 62701-1792
(217) 782-2586
Clerk of the Court Daryll Pratcher
Appellate # 4-92-0863

OTHER COURTS INVOLVED

I. Sangamon County Circuit Court
Seventh Judicial Circuit
Judge John Mehlick
Sangamon County Complex
200 South 9th Street
Springfield, Illinois 62702
(217) 753-6600
Clerk of the Court Candice Trees
Trial Court Case # 91-OV-141

II. Illinois Supreme Court
Supreme Court Building
Chief Justice Ben K. Miller
Springfield, Illinois 62706
(217) 782-2035
Clerk of the Court Juleann Hornyak
Supreme Court # 75123

TABLE OF CONTENTS

I.	Questions Presented For Review	pg. i
II.	List of All Parties Whose Judgement Is Sought To Be Reviewed.	pg. ii
III.	Table of Authorities	pg. vi
IV.	Reference To The Official and Unofficial Reports	pg. 1
V.	Jurisdictional Statement	pg. 3
VI.	The Constitutional Provisions, Statutes, Ordinances, and Regulations Involved in the Case.	pg. 4

TABLE OF CONTENTS, CONTINUED

VII. Concise Statement of the Case Containing the Facts Material to the Consideration of the Question Presented. pg. 8

VIII. Concise Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented. pp. 10

IX. A Direct and Concise Argument of Reasons Relied On for the Allowance of the Writ. pg. 16

X. Conclusion pg. 18

TABLE OF AUTHORITIES

I. RULES OF THE
SUPREME COURT OF THE UNITED STATES
JANUARY 1, 1990

II. THE UNITED STATES CODE ANNOTATED
CONSTITUTION
AMENDMENT 14
DUE PROCESS IN GENERAL
1993
SUPPLEMENTARY PAMPHLET

III. ILLINOIS CODE OF CIVIL PROCEDURE
AND
RULES OF THE SUPREME COURT
AS EFFECTIVE JANUARY 21, 1988

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

1. Opinion of Trial Court
   Appendix pp. 10-15

2. Appellate Court order allowing motion to strike and dismiss the appeal as untimely.
   Appendix pg. 1

3. Appellate Court order denying objection to allowance of motion to strike and dismiss.
   Appendix pg. 2

4. Appellate Court order denying motion to reconsider allowance of motion to strike and dismiss.
   Appendix pg. 3

5. Appellate Court order allowing corrections to objection to allowance of motion to strike and dismiss and overruling same. Appendix pg. 4

6. Appellate Court order denying request to reconsider allowance of motion to strike and dismiss. Appendix pg. 5

7. Illinois Supreme Court order denying petition for leave to appeal from Appellate Court. Appendix pg. 6

8. Illinois Supreme Court orders staying mandate until filing of petition for writ of certiorari. Appendix pp. 7-9

JURISDICTIONAL STATEMENT

Appellant's petition is for a writ of certiorari requesting that the United States Supreme Court review the Illinois Appellate Court order of 5 January 1993 allowing Appellee's 30 December 1992 Motion to Strike and Dismiss.

The Illinois Supreme Court did refuse to hear a request for a discretionary review in this matter.

Appellant's recourse is to petition this United States Supreme Court for a Writ of Certiorari.

This petition for a Writ of Certiorari is presented in accordance with;

Supreme Court Rule 10, 1(a),(b),(c)

U.S.C.: Constitution of the United States; Amendment 14, Section 1.

THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

USCA Constitutional Amendment 14 § 1

(appendix pp. 111-142)

I. Generally

1) Historical

2) Construction

3) Construction with Federal Laws Generally

15) Purpose

18) Law Governing

21) Duty of State Courts

35) Reasonableness of Regulation

37) Elements of Due Process (violations generally)

II. Standards Or Tests

61) Generally

62) Balancing of Interests

63) Arbitrary or Capricious Action

64) Fairness or Justice

65) Rational Relationship

66) Shocking To Conscience

67) Strict Scrutiny (Generally)

68) Compelling State Interest

III. Rights Protected

91) Generally

92) Basic or Fundamental Rights

93) Vested Rights

95) Liberty

96) Property

112) Due Process

113) Just Compensation for Property

126) Access to Courts Generally

128) Miscellaneous Actions Preventing Access to Courts

130) Good Name and Honor

133) Privacy General

V. Methods Of Deprivation Generally

325) Defamations, Libel, or Slander by State Officials

VI. Methods of Deprivation Administrative Rules and

Regulations,

351) Generally

(see appendix pp. 109-110 and 111-142)

CONCISE STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Kren is a U.S. Citizen and a lifelong resident of Illinois.

Kren was, at time of trial, the owner of property which had a non conforming use zoning variance, a legitimate property interest granted by the state and protected by the United States Constitution.

Kren, for 28 years a member of the Springfield Fire Department, had good standing and reputation in the community.

In Circuit court action, brought against Kren by the City, Kren suffered a property loss "zoning", and as a result of trial publicity, a loss of Liberty

"reputation".

Kren was not compensated for this taking.

Kren's appeal to the Illinois Fourth District Appellate Court was stricken procedurally as untimely by the allowance of the City's motion to strike and dismiss, and was not decided on the merits of the appeal.

Kren's objections to City's motion to strike and dismiss, evincing unequal protection of the law, and Kren's request to reconsider, were denied by the Illinois Appellate Court.

Kren petitioned the Supreme Court of Illinois for discretionary review.

The Supreme Court of Illinois chose not to hear Kren.

A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

It is Kren's sincere belief that from its conception and to the present the City's action against Kren has relied for its success upon denial of Kren's fundamental rights guaranteed by the Constitution of the United States.

This action demanding removal of zoning granted by the city from property owned and used by Kren was based upon an abatement claimed by the city to have occurred several years prior to Kren's ownership. This claimed abatement, Kren believes, was known or should have been known by the city to be false. No evidence in support of any intention to abate was ever presented. On May 5 1992,

judgement in favor of the city at Circuit level arbitrarily and unjustly removed this zoning from Kren's property thus denying Kren the right to continued use of said property for welding and repairs, a legal use and part of the value of the property under the zoning as purchased but not under the new zoning imposed by the court. (appendix pp. 16-22)

Kren was not compensated for this taking of property use rights and despite being given ten days in which to conform to the new zoning, which Kren accomplished in less and which was verified by a court visit on 5 May 1992 (day of final judgement), Kren was fined $500.00. (appendix pg. 28-3)

In publicity during and after the trial Kren was accused of having turned a property into a "junkyard" despite

testimony that the opposite had occurred. The levy of a $500.00 fine, also publicized, removed all doubt to the unknowing public of Kren's guilt thus defaming Kren. Kren believes this negative publicity has resulted in his not receiving a promotion to Deputy Division Chief of the Springfield Fire Department, a position promised publicly to him by the Mayor of Springfield prior to trial. In addition to this career loss, Kren has also suffered a lowering of esteem in the eyes of the community. (appendix pp. 140-142)

On 13-may 1992, eight days after final judgement, Kren filed a post trial motion for a new trial in which motion the constitutional issue of denial of due process was complained of. This motion ran concurrently with subsequent post

trial motions, all were heard on 22 September 1992 and were overruled. (appendix pp. 16-22, 10-15 and 31)

On 22 October 1992, in timely fashion under Illinois law, Kren filed notice of appeal to the Illinois Appellate Court Fourth Judicial District.

Sixty-eight days following Kren's notice of appeal the City filed a motion to strike and dismiss alleging untimeliness by Kren. The Fourth Appellate Court allowed the City's motion and denied all subsequent objections to this motion made by Kren.

The failure by the Court to follow its own rules that apply to timeliness is substantive denial of due process, precluded by the 14th Amendment and complained of in Kren's corrected

objection to the City's motion to strike and dismiss. (appendix pp. 26-37 and 4)

The disparity of treatment by the Illinois Appellate Court of Kren's appeal concerning timeliness, and the treatment by other Illinois courts of time requirements for similar cases, is precluded by the equal protection provisions of the Fourteenth Amendment of the Constitution and was clearly complained of in Kren's 26 January 1993 request to reconsider, denied by the court on 01 February 1993.
(appendix pp. 38-62 and 5)

Kren subsequently petitioned for leave to appeal to the Illinois Supreme Court. Kren again complained of this disparity of application of the laws concerning timeliness of appeal.
(appendix pp. 63-108)

The Illinois Supreme Court denied Kren's petition for leave to appeal.
(appendix pg. 6)

These actions by the Illinois Courts effectively deny Kren's access to the courts to be heard on the merits of this case in which rights protected by the constitution are at stake.

A DIRECT AND CONCISE ARGUMENT OF REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Kren's property rights, good name, and reputation were taken by Court action in an arbitrary and capricious manner in Trial Court, apparently with a zealous intent to accommodate the City and blind to truth and justice.

II. The Appellate Court did not consider State statutes governing timeliness in allowing the City's motion to strike and dismiss or in denying both corrected objections by Kren and his request for reconsideration as it did in other similar cases.

III. Justice has not been served by the Court's action and Kren's rights to substantive due process have been denied.

CONCLUSION

In conclusion, for the reasons stated above, Kren asks that this Supreme Court of the United States issue a writ of certiorari in this matter, and after strict review, return the matter to the appellate court of Illinois 4th district to be heard on the merits, or do any act deemed by this court to be in the best interest of justice.

DATED: October 7, 1993

Respectfully submitted,

Donald L. Kren

DONALD L. KREN,
Petitioner Pro Se

93-588

Supreme Court, U.S.
FILED
SEP - 1 1993
OFFICE OF THE CLERK

APPENDIX

PETITION TO THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA
FOR WRIT OF CERTIORARI
DIRECTED TO THE
APPELLATE COURT, FOURTH DISTRICT
STATE OF ILLINOIS

DONALD LEE KREN
Petitioner

vs.

CITY OF SPRINGFIELD, ILLINOIS
Respondent

DONALD L. KREN
1632 LOVELAND
SPRINGFIELD, IL 62703
(217) 522-7934

INDEX

PAGE	ORDERS
1.	Appellate Court order allowing motion to strike and dismiss.
2.	Appellate Court order denying objection to allowance of motion to strike and dismiss.
3.	Appellate Court order denying motion to reconsider allowance of motion to strike and dismiss.
4.	Appellate Court order allowing corrections to objection to allowance of motion to strike and dismiss and overruling same.
5.	Appellate Court order denying request to reconsider allowance of motion to strike and dismiss.
6.	Illinois Supreme Court order denying petition for leave to appeal from Appellate Court.
7-9	Illinois Supreme Court orders staying mandate until filing of petition for writ of certiorari.
	OPINIONS
10-15	Opinion of Trial Court.
	MOTIONS
16-22	Motion for rehearing or new trial.

INDEX

MOTIONS CONTINUED

23-25 Motion to reconsider order allowing motion to strike and dismiss.

26-37 Corrected objection to allowance of motion to strike and dismiss.

38-62 Request to reconsider or second corrected objection to allowance of motion to strike and dismiss.

PETITION

63-108 Petition for leave to appeal to Illinois Supreme Court.

AUTHORITIES

109-110 Illinois Code of Civil Procedure and Rules of the Supreme Court, January 21, 1988(in part).

111-142 United States Code Annotated
Constitution
Amendment 14
Due Process In General
1993(in part).

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE:January 5, 1993
RE:City of Springfield v. Kren
General No. 4-92-0863
Sangamon County No.91-OV-141

TO COUNSEL:

appellee's motion to strike and dismiss the appeal in the above-captioned cause ALLOWED.

APPEAL DISMISSED as untimely.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:py

TO: Theodore R. Schullian
Assistant Corporation Counsel
Room 100, Municipal Building
Springfield, IL 62701-1680

Donald Lee Kren
1632 Loveland
Springfield, IL 62703

Carl D. Oblinger, Circuit Clerk,
Sangamon County

Honorable John A. Mehlic

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE:January 6, 1993
RE:City of Springfield v. Kren
General No. 4-92-0863
Sangamon County No.91-OV-141

TO COUNSEL:

Apellant's motion for leave to file supplemental record in the above-captioned cause DENIED AS MOOT.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:py

TO:Donald Lee Kren
1632 Loveland
Springfield, IL 62703

Theodore R. Schullian
Assistant Corporation Counsel
Room 100, Municipal Building
Springfield, IL 62701-1680

Carl D. Oblinger, Circuit Clerk
Sangamon County

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE:January 12, 1993
RE:City of Springfield v. Kren
General No.4-92-0863

TO COUNSEL:

Appellant's motion to reconsider order allowing appellee's motion to strike and dismiss DENIED.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:py

TO: Donald Lee Kren
1632 Loveland
Springfield, IL 62703

Theodore R. Schullian
Assistant Corporation Counsel
Room 100 - Municipal Building
Springfield, IL 62701

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE:January 20, 1993
RE:City of Springfield v. Kren
General No. 4-92-0863

TO COUNSEL:

Appellant's motion to allow corrections to objection to plaintiff's motion to strike and dismiss ALLOWED.

Apellant's corrected objection to plaintiff's motion to strike and dismiss filed per order.

Apellant's objections to appellee's motion to strike and dismiss OVERRULED.

DARRYL PRATSCHER, Clerk
Apellate Court
Fourth District

DP:py

TO: Donald Kren
1632 Loveland
Springfield, IL 62703

Theodore R. Schullian
Assistant Corporatio Counsel
Room 100, Municipal Building
Springfield, IL 62701

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

DATE:February 1, 1993
RE:City of springfield v. Kren
General No. 4-92-0863

TO COUNSEL:

Apellants request to reconsider or second corrected objection to plaintiff-appellant's motion to strike and dismiss DENIED.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:py

TO:Donald Lee Kren
1632 Loveland
Springfield, IL 62703

Theodore R. Schullian
Assistant Corporation Counsel
Room 100 - Municipal Building
Springfield, IL 62701

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 783-2035

June 3, 1993

Mr. Donald Lee Kren
1632 Loveland
Springfield, IL 62703

In re: No. 75123 - The City of Springfield, Illinois, etc., respondent, v. Donals Kren, Sr., petitioner. Leave to appeal, Appellate Court Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1993.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

SPRINGFIELD 62706

JULY 16, 1993

Mr. Donald Lee Kren
1632 Loveland
Springfield, Illinois 62703

In Re: The City of Springfield, Illinois, etc., respondent, v. Donald Kren, Sr., petitioner. No. 75123.

Dear Mr. Kren:

Enclosed please find a copy of an order entered July 16, 1993, by the Illinois Supreme Court in the above-entitled cause.

Very Truly Yours,

Clerk of the Supreme Court

J.!/rlw

Enc.

cc: Chief Justice Miller
Mr Theodore R. Sullivan

No. 75123

IN THE

SUPREME COURT OF ILLINOIS

The City of Springfield, Illinois	)	
respondent	)	Petition for Leave to Appeal from the
v.	)	Appellate Court Fourth District
Donald Kren, Sr.,	)	AC4-92-0863
petitioner	)	91-OV-141

ORDER

This matter has come for consideration upon the motion of petitioner, pro se, to stay the mandate of this Court pending appeal to application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed

pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which said application or notice may be filed. If certiorari is applied for or notice of appeal filed, the mandate of this Court shall,upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

IN THE CIRCUIT COURT FOR THE

SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	MISDEMEANOR DIVISION
Plaintiff,	)	No. 91-OV-141
-vs-	)	
DONALD KREN, Defendant	)	

MOTION HEARING

REPORT OF PROCEEDINGS of the hearing held before the Honorable JOHN A. MEHLICK on the 22nd day of SEPTEMBER, 1992.

APPEARANCES:

MR. TED SCHULLIAN,

Attorney at Law

on behalf of the Plaintiff,

MR. SAMUEL PATTON

Attorney at Law

on behalf of the Defendant.

Tracy L. Mahan, CSR#084-002820

Official Court Reporter

624 Sangamon County Complex

Springfield, IL 62701

(217) 753-6821

THE COURT: Well, I believe that with regard to the time factor not whether or not you can have more than one post trial motion it was probably the Defendant has filed another motion within the timely fashion and then he asks for leave to file an ammended motion after he got an opportunity to review the matter. So I think it was properly filed in a timely fashion.

With regard to whether or not one or more motions can be filed, yes, there is case authority that says there should be only one post trial motion and then once that is denied within 30 days you can file a notice of appeal if you want to. As Mr. Schullian pointed out the court's have said there is a time to bring matters to a conclusion at the trial level and then move on to other matters and let the Appellate Court review that case. I believe there is some case law

that says if there is newly discovered evidence that you could file another motion and bring that to the Court's attention, if that is properly filed.

I believe under 110, 2-1401, the relief of judgement-post judgement, you can file more motions under certain circumstances supported by affidavit. I am not saying that this does fall under that but that argument can be made and I am going to rule for the purpose of this hearing that procedurally they can file these motions. The first one was done by Mr. Kren individually without assistance of counsel and then Mr. Patton got into the case later and then reviewed the matter and filed an ammended motion, and so I think I am going to rule on the motion even though procedurally I think I could rule that they were not that you can only have one and then if it is not within 30 days there is a question of

that you could procedurally dismiss that without having to hear them at all. I am going to hear them. I did hear the arguments and I have heard the responses as to them and am ruling that they can file more than one and it is filed timely and I find if you bootstrap the other two into the one that was filed pro se on May 13, however, Mr. Kren and Mr. Patton, I do believe that the arguments as stated by Mr. Schullian and there was sufficient basis despite the matters that you have argued and brought forward in your ammended motion for new trial, your motion to vacate and your motion filed pro se to support my finding on behalf of the city as to Count I for non conforming use had expired. I don't believe the matters you have raised in any way would change my mind and I believe there is sufficient other evidence to show that that non conforming use expired and the

fact that when at what time Mr. Fleischli moved the equipment to Otto Boilers is not a crucial point to me in making a determination.

I am denying Defendant's pro se motion filed on May 13, and I am denying the motion to vacate judgement and new trial filed on May 14, and denying ammended motion for new trial filed on June 30, and I am not going to hear any more post trial motions on this matter.

Gentlemen, if you want to do anything further, you will have to within the next thirty days from today's date, I am ruling this is the final ruling on it if you do want to file anything else you need to file a notice of appeal.

Thank you.

IN THE CIRCUIT COURT FOR THE SEVENTH
JUDICIAL CIRCUIT OF ILLINOIS
SANGAMON COUNTY, SPRINGFIELD, ILLINOIS

THE CITY OF SPRINGFIELD, ILLINOIS
a Municipal Corporation

No. 91-OV-141

Plaintiff

vs.

DONALD LEE KREN

Defendant Prose

MOTION

DEFENDANT REQUESTS A REHEARING OR IN THE ALTERNATIVE, A NEW TRIAL

BASIS

FALSE TESTIMONY WAS CRUCIAL IN THE DECISION REACHED BY THIS COURT

NOW COMES THE DEFENDANT PROSE AND FOR HIS REQUEST STATES AS FOLLOWS:

The truth was not revealed at trial.

New evidence clearly shows that the court in making its decision was compelled and deceived by testimony that was absolutely false.

False testimony was in fact the "corner stone" of the action brought by the city of Springfield against the defendant. The alleged abatement (Mar. 83 - Dec. 84) was constructed and structured to occur after the last recorded inspection and to end at a time selected to defeat the discovery process. Defendant believes this was done knowingly and with malice.

Plaintiff argued for heavy fines to be imposed on Defendant knowing all along that their complaint was without foundation in truth.

Two thriving businesses , which had in fact out grown their location at 1111 N. Lincoln, were presented as one hobby-like business that faltered and thereby abated the variance.

Defendant believes his right to privacy has been violated and his peace of mind destroyed. Defendant believes early publicity presented him as a villain who had turned a neighborhood into a "junkyard", When in fact his expense of time, money, and effort was being effectively directed to the opposite.

Great expense of time and money has and is being expended by Defendant in defense of false claims by Plaintiff.

Defendant's pending promotion has been delayed if not prevented by adverse publicity which accompanied these proceedings in the early stages before the court visited the property.

Economic loss has resulted from Defendant being stripped of his right to service and repair, on this property, equipment used for business purposes.

Great and needless expense to the taxpayers and this court continues to be the result of Plaintiff's action with no foreseen benefit to the community.

Defense on this action has impeded and delayed progress of Defendant's slow but steady work in restoring this property to usefulness.

The stress of these events has been detrimental to the Defendant's health of mind and body, causing loss of sleep and fear and uncertainty of the outcome.

The insolence of bureaucracy has, by concerted effort, replaced the freedom of the individual as no valid complaint was ever presented by the Plaintiff. No abatement occurred, no junkyard exists, and due process (condemnation proceeding) has been denied. Is this American?

WHEREFORE:

DEFENDANT AT REHEARING OR RETRIAL WILL PRESENT PROOF OF FALSE TESTIMONY BY PLAINTIFF AND ASK THIS COURT TO GRANT AND ORDER THE FOLLOWING:

1. Public apology by Plaintiff.

2. Defendant's legal expenses and court costs be paid by Plaintiff

3. Permanent zoning be granted to replace the variance and thereby prevent recurrence of this action by Plaintiff.

4-92-0863

IN THE

APPELLATE COURT

OF THE

STATE OF ILLINOIS

FOURTH JUDICIAL DISTRICT

DONALD KREN, pro se	)	Appeal from the
	)	Circuit Court for
Defendent-	)	the Seventh
Appellant	)	Judicial Circuit
	)	
vs.	)	Sangamon County
	)	
THE CITY OF	)	No. 91-OV-141
SPRINGFIELD, ILL.	)	
a Municipal Corp.	)	HONORABLE
	)	JOHN G. MEHLIC
	)	Presiding
Plaintiff-	)	
Appellee	)	

MOTION TO RECONSIDER ORDER ALLOWING APPELLEE'S MOTION TO STRIKE AND DISMISS

Now comes the Defendant Donald Kren, pro se, and respectfully moves this honorable court to reconsider the order of 5 Jan 1993 allowing Plaintiff's Motion to Strike and Dismiss, and in support there of, states as follows:

1.That, possibly delayed by holiday weekend, notice of the Plaintiff's Motion to Strike and Dismiss did not arrive by mail until(Monday) 4 Jan 1993 at 1632 Loveland.

2.That on(Tuesday)5 Jan, the Court allowed the Plaintiff's Motion to Strike and Dismiss.

3. That Defendant's Objection to Plaintiff-Appellee's Motion to Strike

and Dismiss, is attached.

WHEREFORE, the Defendant prays that this Court consider the objection to Plaintiff-Appellees Motion to Strike and Dismiss, and reconsider and deny the order of 5 Jan allowing the Motion to Strike and Dismiss, and instead proceed with the review as scheduled.

BY: _____

Donald Lee Kren, pro se

4-92-0863

IN THE

APPELLATE COURT

OF THE

STATE OF ILLINOIS

FOURTH JUDICIAL DISTRICT

DONALD L. KREN	)	Appeal from the
Defendant-	)	Circuit Court for
Appellant	)	the Seventh
	)	Judicial Circuit
vs.	)	
	)	Sangamon County
THE CITY OF	)	
SPRINGFIELD,	)	No. 91-ov-141
ILLINOIS a	)	
Municipal	)	HONORABLE JOHN G.
Corporation	)	MEHLICK Presiding
	)	
Plaintiff-	)	
Appellee,	)	

CORRECTED OBJECTION TO

PLAINTIFF-APPELLEE'S

MOTION TO STRIKE AND DISMISS

NOW COMES the Defendant-Appellant, Donald Kren, pro se, and respectfully moves this honorable court to deny Plaintiff-Appellee's Motion to Strike and Dismiss and in support there of, states as follows:

1. That on April 1, 1992, after a bench trial,the court dismissed Count II of Plaintiff's complaint, found in favor of the Plaintiff as to Count I, and in favor of the Defendant on Count III. The action was continued to May 5. Additionally Kren is ordered to have the property in compliance with R3 Zoning on this date.

(C00225)

Rev.Stat.,Chapter 110A,Section231(e)

2. On May 01, 1992, Defendant-Appellant Kren did file a Motion to Reconsider,

(C00098-C00102)

3. On May 05, 1992 the Court visited the property, and in Final Judgement denied the Motion to Reconsider and fined Defendant-Appellant Kren $500.00.

(C00103)

4. On may 13, 1992, within 30 days after entry of the order of April 13, upon discovery of new evidence, Defendant-Appellant Kren,pro se, filed a motion requesting a re-hearing or in the alternative, a new trial.

(C00104-C00108)

(C00226)

5. On May 14, 1992, Timely With Consent of Plaintiff, Defendant-Appellant pro se, filed a Motion to Vacate Judgement and grant a new trial citing New Evidence.

(C00109)

6. On May 14, 1992, with consent of Defendant Kren, Sorling Law Firm filed a motion for Leave to Withdraw.

(C00110-C00111)

7. On May 15, 1992, the Court set a hearing for June 2, 1992 on motions of May 13 and May 14.

(C00113)

Ill.Rev Stat.Ch.110A,Sec.13-216

See 16 Below

8. On June 1, 1992, with consent of Plaintiff(City of Springfield), Defendant Kren with new counsel filed a motion for Continuance and Leave to File an ammended

motion for a new trial.

(C00187)

See 14,15, and 16 below

9. On June 1, 1992, the Court ordered that the hearing scheduled for June 2 is cancelled and Granted Leave to file an Ammended Motion by June 30 to Defendant kren, Plaintiff(City of Springfield) having no objection. Also at this time, the $500.00 fine is paid by Defendant Kren.

(C00188)

See 14,15, and 16 below

10. June 30, 1992, Defendant Kren filed a motion for a new trial. Attached to this motion is new evidence including Affidavits, Advertising, and Report of proceedings and Certified records from Probate Court.

(C00191-C00194)

Attachments Affidavits (C00189),(C00190)

Advertising(C00115-C00175)

Proceedings Vol. II

Probate Records (C00176-C00186)

11. September 8, The Hearing on the Ammended Motion of June 30 for a new trial is set for September 22.

(C00194)

Ill.Rev.Stat.,Ch.110,Sec.2-1007

Ill.Rev.Stat.,Ch.110A,Section231(e)

Ill.Rev.Stat.,Ch.110,Sec.13-216

12. September 22, Hearing on the Ammended Motion of June 30. Motions filed on May 13, May 14, and June 30 all denied. Advised by the Court that this is the final ruling.

Vol.III Proceedings, p.16

(C00227)

13. That on October 22, 1992 Defendant filed Notice of Appeal.

(C00195)

Ill.Rev.Stat.,Ch.110A,Sec.303

See 17 below

14. That Ill.Rev.Stat.,Chapter 110, Section 2-1007 reads in part "Extension of Time and continuances. On good cause shown, in the discretion of the Court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgement."

15. Ill.Rev.Stat.,Chapter 110A, Section 231(e) Court's own Motion. The Court may on its own motion, or with the consent of the adverse party, continue a cause for trial to alater day.

16. Ill.Rev.Stat.,Chapter 110, Section 13-216 Stay of Action. When the commencement of an action is stayed by

injunction, Order of a Court, or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

17. Chapter 110A(Supreme Court Rule 303). Appeals from Final Hudgements of the Circuit Courts in Civil cases in part reads:

(a) Time: Filing: Transmission of Copy

(1) Except as provided in paragraph (b) below, the notice of appeal must be filed with the Clerk of the Circuit Court within thirty days after the entry of the final judgement appealed from, or, if a timely post-trial motion directed against the judgement is filed, whether in a jury or non-jury case, within 30

days after the entry of the order disposing of the last pending post-trial motion.

(2) When atimely post-trial motion has been filed by any party, whether in a jury case or a non-jury case, a notice of appeal filed before the entry of the order disposing of the last pending post-trial motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal persuant to Rule 309. This is so whether the timely post-trial motion was filed before or after the date on which the notice of appeal was filed. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the post-trial motion, as

provided in subparagraph (a)(1) of this rule. No request for reconsideration of a ruling on a post-trial motion will toll the runningof the time within which a notice of appeal must be filed under this rule. A party who filed a premature notice of appeal will not be required to pay a filing fee for the future appeal in the samecase if, at the time of filing the future appeal, he presents the receipt for the fee paid for filing the premature notice of appeall and a copy of the Circuit Court order dismissing the premature appeal.

(b)(4) The notice of appeal may be ammended without leave of court within 30 days after the entry of the judgement, or, if a

> timely post-trial motion directed against the judgement is filed, whether in a jury case or a non-jury case, later than 30 days after the entry of the order disposing of the last pending motion, except upon motion pursuant to paragraph (e) of this rule.

18. Since final judgement was issued September 22, and in consideration of the Continuance granted June 1, for good cause and with consent of all parties, Defendant's Ammended Post-trial Motion heard September 22 was timely and therefore the October 22 Notice af Appeal was timely.

WHEREFORE, the Defendant Kren asks this Honorable Court to Deny Plaintiff's Motion to Strike and Dismiss and proceed with the Appeal.

BY:_____

Donald Lee Kren, pro se

Donald Lee Kren
1632 Loveland
Springfield, IL 62701
(217) 522-7934

4-92-0863

IN THE

APPELLATE COURT

OF THE

STATE OF ILLINOIS

FOURTH JUDICIAL DISTRICT

	)	
	)	APPEAL from
	)	the Circuit
DONALD LEE KREN	)	Court for the
	)	Seventh
	)	Judicial
	)	Circuit
Defendant-Appellant	)	
	)	Sangamon
	)	County
	)	

	)	
	)	
THE CITY OF	)	
SPRINGFIELD, ILLINOIS	)	HONORABLE
a Municipal Corporation	)	JOHN G.
	)	MEHLICK
	)	Presiding
Plaintiff-Appellee,	)	

REQUEST TO RECONSIDER
OR SECOND CORRECTED
OBJECTION TO PLAINTIFF-APPELLANT'S
MOTION TO STRIKE AND DISMISS

NOW COMES the Defendant-Appellant, Donald Kren, pro-se, and respectfully moves this honorable court to deny Plaintiff-Appellee's Motion to Strike and Dismiss and in support thereof, states as follows:

1. That on April 13, 1992, after a

bench trial, the trial court dismissed Count II of Plaintiff's complaint, found in favor of the Plaintiff as to Count I, and found in favor of the Defendant on Count III. The action was **continued** to May 5. Additionally, Kren is ordered to have the property in compliance with R 3 Zoning on that date. **No express written finding that there is no just reason for delaying the appeal in docket entry or open court.** Ill. Rev. Stat., Ch. 110A, Section 231(e). Ill. Rev. Stat., Ch. 110A, Section 304(a) (Vol. II Proceedings, pp. 147-155) (C00225).

2. On May 1, 1992, prior to final judgment, Defendant did file a Motion to Reconsider. (C00098-C00102).

3. On May 5, 1992, the Court first Denied the May 1 Motion to Reconsider, then visited the property and in Final

Judgement ruled the property in conformance with R 3 zoning and fined Defendant Kren $500.00 on Count One. (C00103)

4. On May 13, 1992, **Upon discovery of new evidence**, Defendant filed a post trial motion requesting a hearing or in the alternative a new trial. (C00104-C00108) (C00226)

5. On May 14, 1992, **Citing new evidence**, Defendant filed a Motion to Vacate Judgment and grant a new trial (C00109)

6. On May 14, 1992, With consent of Defendant, Atty. Kauerauf filed a Motion for Leave to Withdraw. (C00110-C00111)

7. On May 15, 1992, The court set a

hearing for June 2, 1992 on Motions of May 13, May 14. (C00113)

8. On June 1, 1992, With consent of Plaintiff, Defendant with new counsel filed a Motion for Continuance and Leave to File an Amended Motion for a New Trial. (C00187) (See 12,13, and 14 below).

9. On June 1, 1992, Plaintiff having no objection,The court ordered that the hearing scheduled for June 2 is cancelled and granted leave to file an amended motion by June 30 to Defendant, Also at this time the $500.00 fine is paid by Defendant. (C00188)

10. On June 30, 1992, Defendant filed an amended motion for a new trial. Attached to this motion is new evidence including Affidavits (C00189, C00190);

Advertising (C00115-C00174); Proceedings Vol. II; and Probate Records (C00175-C00186).

11. On September 8, 1992, the hearing on the amended motion of June 30 for a new trial is set for September 22, 1992. (C00194). Ill. Rev. Stat., Ch. 110, Section 2-1007; Ill. Rev. Stat., Ch. 110A, Section 231(e); Ill. Rev. Stat., Ch. 110, Section 13-216.

12. That ILL. Rev. Stat., Ch. 110, Section 2-1007 reads in part "Extension of Time and Continuances. On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment."

13. Ill. Rev. Stat., Ch. 110A, Section 231(e), Court's own Motion. The court may on its own motion, or with the consent of the adverse party, continue a cause for trial to a later day.

14. Ill. Rev. Stat., Ch. 110, Section 13-216 Stay of action. When the commencement of an action is stayed by injunction, Order of a Court, or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

15. On September 22, a hearing was held on motions filed on **May 13**, May 14, and Amended Motion of June 30. All motions were denied and parties were advised by the court that this is the **final** ruling. (Proceedings, Vol. III, P.

16) (C00227).

16. On October 22, 1992, Defendant filed a Notice of Appeal. (C00195) Ill. Rev. Stat., Ch. 110A, Section 303(a)(1); Ill. Rev. Stat;., Ch. 110A, Section 304(a). See 17 and 18 below.

17. Ill. Rev. Stat., Ch. 110A, Supreme Court Rule 303, Appeals from Final Judgements of the Circuit Courts in Civil Cases in part reads:

> Supreme Court Rule 303. Appeals from Final Judgments of the Circuit Courts in Civil Cases.
>
> (a) Time: Filing: Transmission of copy.
>
> (1) Except as provided in paragraph (b) below, the notice of appeal must be filed with the clerk of the circuit court within 30 days

after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed, whether in a jury or a non-jury case, within 30 days after the entry of the order disposing of the last pending post-trial motion. (2) When a timely post-trial motion has been filed by any party, whether in a jury case or a non-jury case, a notice of appeal filed before the entry of the order disposing of the last pending post-trial motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal

pursuant to Rule 309. This is so whether the timely post-trial motion was filed before or after the date on which the notice of appeal was filed. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the post-trial motion, as provided in subparagraph (a)(1) of this rule. No request for reconsideration of a ruling on a post-trial motion will toll the running of the time within which a notice of appeal must be filed under this rule. A party who filed a premature notice of appeal will not be required to pay a filing fee for future

appeal in the same case if, at the time of filing the future appeal, he presents the receipt for the fee paid for filing the premature notice of appeal and a copy of the circuit court order dismissing the premature appeal.

18. **(Supreme Court Rule 304). Appeals From Final Judgements That Do Not Dispose of an Entire Proceeding** in part reads.

(Chapter 110-A, Section 304) (a), Judgments As To Fewer Than All Parties or Claims - Necessity for special Finding. If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken

from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an **express written finding that there is no just reason for delaying enforcement or appeal.** Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is **not enforceable or appealable** and is subject to revision at any time before the entry of a judgment adjudicating

all the claims, rights, and liabilities of all the parties.

19. Since final judgment was issued May 5, Defendant's Post trial motion of May 13th was timely. Defendant's Post Trial Motion of May 13th and all subsequent motions were heard September 22, 1992. (C00277).

20. The Notice of Appeal followed on October 22 1992. (C00195) To have filed a notice of appeal by June 5 would have denied the trial court the opportunity to hear the new evidence that Defendant expected would resolve the controversy without involving the Appellate Court. But for the new evidence discovered after May 5, which resulted in the post trial motion May 13, the appeal could have been initiated before June 5, An appeal after the post trial motion of May 13 would have had no effect as

jurisdiction was with the trial court on the post trial motion pending.

Cases Relied Upon

Chand v. Schlimme, 38 Ill. 2d 469, on page 477 states:

> "A party wishing to bring an appeal must, however, wait until the trial court rules on any pending post-trial motions before bringing an appeal. As the rules clearly state, a notice of appeal that a party files before the circuit court has disposed of a timely post-trial motion has no effect".

Marriage of Jones, 187 Ill. App. 3d 206, on page 213 states:

"Thus, we believe that City of Chicago v. Greene is directly applicable to the situation presented here. As the Illinois Supreme Court stated there, "{t}he issues not raised in the defendant's original post-trial motion but raised by the subsequent post-trial motions of the defendant could have been regarded as a supplement or amendment to his original post-trial motion and it was properly within the discretion of the trial court to have allowed * * * such subsequent motions." (Greene, 47 Ill. 2d at 33.) Further, in a hearing on reconsideration, the court may hear additional evidence which might be reason for change in the original order.

Marriage Uphoff, 457 N. E. 2d 426, on pages 426, 427, and 428 states:

> "As long as any party's timely post-trial motion remains undisposed, underlying judgment is not final, notice of appeal is premature, and complete jurisdiction remains in the circuit court, S. H. A. Ch. 110A, Paras. 303, 303(a)." "We find that the circuit court retained jurisdiction to hear the defendants' post-trial motion * * *.' (92 Ill. 2d 530, 543-544, 65 Ill. Dec. 852, 442 N.E. 2d 163.) Since defendant's notice of appeal was filed "within 30 days after the entry of the order disposing of the {post-trial} motion" (87 Ill. 2d R. 303(a)), the notice of appeal was found to be proper."

"Had she filed a notice of appeal prior to the trial court's disposition of defendant's timely post-trial motion, the notice would have been premature, since no final judgment had been entered."

Bell Federal Savings & Loan v. Bank of Rosewood, 203 Ill. App. 3d 219, on page 223 states:

"The court defaulted Korea, found that Ravenswood had a valid lien for $ 130,087.44 and **expressly found that there is no just cause for delay in the enforcement of or appeal from this Decree.**" Accordingly, as Ravenswood asserts, the July 11 order was the final and appealable order, and the time to file either a post-trial motion

or a notice of appeal commenced to run on July 11, 1986".

Benet Realty Corp. v. Lisle S&L Assn., 175 Ill. App. 3d 227, on page 235 states:

"However, there was still time remaining in which plaintiffs could have filed a post-trial motion attacking the final judgment because 30 days had not yet passed from the September 25, 1987 final judgment. Had plaintiffs filed a timely post-trial motion, attacking the final judgment, the running of the time to file a notice of appeal by either party would have been tolled."

21. Recent court decisions (cited) have held, in cases similar to this one,

any appeal prior to disposition of the last timely post-trial motion is a Premature Appeal. This is true, unless the trial court **expressly provides** for piecemeal appeals prior to that judgment that disposes of all the matters before the court. Jurisdiction remains with the court until the last timely post-trial motion is heard.

22. Defendant's Post-Trial Motion of May 13 was timely, coming 30 days after the first day of trial and seven days after final judgment. Defendant does not agree to consideration of it as a second Post-Trial Motion, as the only previous motion, a motion for reconsideration, was entered before final judgment. Additionally, the evidence that the Motion of May 13 asked to present was new. The Motion was heard 22 Sept. 1992, and although (it's content was) not

convincing to the trial court, it was first discovered after final judgment (May 5) and it's necessity could not reasonably have been anticipated at trial.

In regard to the new evidence:

I did not expect false testimony and was surprised by its presentation. Had I expected such, I still could not have known the specific falsehood that I would be required to disprove. I,my son Mitchell and many neighbors to 1111 No. Lincoln testified to welding and repairs being performed at 1111 No. Lincoln, during and after the time of the alleged abatement in 1983 and 1984. In rebuttal, Joseph Fleischli testified that the work he was doing then, in 1983 and 1984, was moving equipment to Otto Boiler. Vol. II pg. 128, 17 through 22. The court

believed him, saying at Vol. II, pg 148, 5 through 10, "I am convinced by a preponderance of the evidence that the non-conforming use did cease, was extinguished in approximately '84 and '85. By the testimony of Mr. Fleischli and because I found that that terminated . . ."

I and everyone I knew who was familiar with 'Otto Boiler', believed Ernie Otto owned it until Fleischli's presence there (Otto Boiler) in 1987. Before trial I visited Mr. Otto at his home to ask him when Fleischli became involved with 'Otto Boiler'. Mr. Otto appeared to be infirm, not a well person, and was not willing to discuss the matter.

The sale of 'Otto Boiler' to Keith Elmore by Ernie Otto was not recorded.

Post trial publicity made the trial a topic of conversations in which I learned of Keith Elmore and subsequently James Lockwood. The first time I ever saw Mr. Elmore was May 12. At that meeting he presented me with an affidavit, and directed me to Mr. Lockwood. Both Elmore (C00189) and Lockwood (C00190) refute Fleischlis' testimony of activities in 1984 through 1985 at 1111 No. Lincoln. "Well, I had been trying to move some of that--some of the things that I had out there over to Otto Boiler," (Proceedings Vol. II, page 128, 2 through 19).

The Donnelley Advertising at (C00115 through C00175), (which) confirms the affidavits of both Elmore and Lockwood , (C00189) and (C00190) also discredits Joseph Fleischlis' denial of any commercial activity at 1109-1121 No.

Lincoln by his statement (proceedings Vol. II, page 8, 3 and 4) "There was never any commercial--there was never commercially any business in any of those locations."and (proceedings Vol. II, page 7, 9 through 13) "Q Was there ever any commercial activity on 1109 through 1121 North Lincoln during the years of 1984 and 1985 or not?

A I never had ever used that in a commercial capacity. It was a little hobby shop there and I did some hobby work."

The advertising also confirms Kren in (Proceedings Vol. II
p. 90, 9 through 24, and on p. 91, 1 through 8), describing commercial activity at the site.

The weight given by the court to the testimony of intentions to abate the **non conforming use variance** by one co-

executor, (Joseph Fleishli) with no apparent knowledge or consent of the other co-executor, Anna May Brown, led me to the Probate Court for a check of credentials. From the records at the probate Court I discovered that Joseph Fleischli's status as co-executor was objected to by the other heir and co-executor and more importantly that Joseph Fleischli had paid great utility expenses on the "vacant" property, (Vol. II, page 10, 17 through 19), and wrote more than 371 business checks between February 17, 1983 and August 4, 1986. This reveals that the property was not vacant during 1983, 1984, and 1985 and that, contrary to sworn testimony by Fleishli, business records (utility bills and a business checking account) did exist for that period. (C00176-C00186), (Vol.II, page 10, 6 through 19).

These documents considered by the court (Vol. III, page 15, 7 through 24, and page 16, 1 through 3), reveal that Fleischli was in residence, advertised for, and engaged in commercial activity at 1111 No. Lincoln during 1983 through 1986 and was mistaken when he said there were no records. (Vol. 2, Page 10, 6 through 8). Consideration of these documents reveals that there was neither abatement of the non-conforming use at 1111 No. Lincoln during 1983, 1984, or 1985, nor a move to 'Otto Boiler' until after 4 April 1987.

Wherefore, Defendant-Appellant, Donald Lee Kren, asks this Honorable Court to Reconsider and Deny Plaintiff's Motion to Strike and Dismiss and proceed with the appeal.

_____

Donald Lee Kren, Defendant-Appellant

No. 75123

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS

DONALD LEE KREN

Defendant-Petitioner,

vs.

THE CITY OF SPRINGFIELD, ILLINOIS

a Municipal Corporation

Plaintiff-Respondent

Petition for Leave to Appeal from the Illinois Appellate Court, Fourth Judicial District, No. 4-92-0863, there heard on Appeal for the Circuit Court for the Seventh Judicial Circuit, Sangamon

County, Illinois, No. 91-0V-141, Honorable John G. Mehlick Judge Presiding.

PETITION FOR LEAVE TO APPEAL

Donald Lee Kren
1632 Loveland
Springfield, Illinois 62703
(217)-522-7934

Defendant-Petitioner pro se

INDEX

PETITION FOR LEAVE TO APPEAL . . . 67

JURISDICTIONAL STATEME IT 68

NATURE OF THE CASE, A BRIEF HISTORY 69

REASONS WHY THIS COURT SHOULD GRANT LEAVE TO APPEAL 72

POINTS AND AUTHORITIES

Cases Relied Upon 75

POINTS AND AUTHORITIES

Rules Relied Upon 80

POINTS AND AUTHORITIES

Petitioners' Affidavit concerning new evidence 86

a. The Affidavits of Keith Elmore and Joe Lockwood 88

b. The Donnelly Advertising . . . 90

c. The Probate Records 92

STATEMENT OF FACTS OF THE CASE . . . 95

ARGUMENT 102

PRAYER 108

PETITION FOR LEAVE TO APPEAL

To: The Honorable Justice of the
Illinois Supreme Court

Your Petitioner, Donald Lee Kren pro se, hereby petitions this Court for leave to appeal from the January 5, 1993 decision of the Illinois Appellate Court, Fourth District, wherein the Court Allowed Appellee's Motion to Strike and Dismiss and Dismissed Appellants Appeal as untimely.

JURISDICTIONAL STATEMENT

Appellants' Petition is for permission to appeal to the Illinois Supreme Court from the Appellate Court final order Jan 26, 1993 Denying reconsideration of the Appellate Court order Jan 5, 1993, Allowing Appellees Dec 30, 1992 Motion to Strike and Dismiss.

This Petition for Permission to Appeal is based on Illinois Revised Statute Chapter 110A, Article III, Civil Appeals Rules Part B, Appeals from the Appellate Court to the Supreme Court, Rule 315(a) Leave to Appeal.

NATURE OF THE CASE

A BRIEF HISTORY

On October 22, 1992, Defendant filed a Notice of Appeal.

On November 11, 1992, the Docketing Order was entered.

On December 30, 1992, Plaintiff-Appellee filed a Motion to Strike and Dismiss.

On January 5, 1993, The Court Allowed Appellee's Motion to Strike and Dismiss.

On January 7, 1993, Appellant Donald Kren filed a Motion to Reconsider [objection to] Order Allowing Appellee's Motion to Strike and Dismiss, this motion was Denied on January 12, 1993.

On January 14, 1993, Appellant Donald Kren filed a Motion to Allow Corrections to Objection to Plaintiff's Motion to Strike and Dismiss and at the same time filed the Corrected Objection to Plaintiff's Motion to Strike and Dismiss.

On January 20 the Court Allowed Defendant-Appellants' Corrections to Objection to Plaintiff's Motion to Strike and Dismiss, but Overruled Defendant-Appellant's Corrected Objection to Appellee's Motion to Strike and Dismiss.

On January 26, 1993, Appellant Donald Kren filed a Request to Reconsider or Second Corrected Objection to Plaintiff-Appellee's Motion to Strike and Dismiss. On February 1, 1993, the Court Denied this request.

On February 11, 1993, within 21 days of the February 1 ruling Denying the petition for rehearing, Appellant Donald Kren filed both an Affidavit of Intent to Petition for Leave to Appeal and Notice of filing same.

This Petition for Leave to Appeal follows.

REASONS WHY THIS COURT SHOULD GRANT LEAVE TO APPEAL

This Court should grant leave to appeal in this matter for the following reasons:

1. On January 5, 1993 The Appellate Court DISMISSED Appellants' Appeal as UNTIMELY and Allowed Appellee's December 30, 1992 Motion to Strike and Dismiss. No further explanation was given.

2. The Appellate Court's decision conflicts with the following Illinois Court decisions.

Chand v. Schlimme, 38 Ill. 2d 469

Marriage of Jones, 187 Ill. App. 3d 206

Greene, 47 Ill. 2d at 33

Marriage Uphoff, 457 N. E. 2d 426
92 Ill. 2d 530, 543-544,
65 Ill. Dec. 852,
442 N.E. 2d 163, and
87 Ill. 2d R. 303 (a)

Bell Federal Savings & Loan v Bank of Rosewood,
203 Ill. App. 3d 219

Benet Realty Corp. v. Lisle S&L Assn.,
175 Ill. App. 3d 227

This conflict can be resolved only by review in This Court. If this Appellate Court Decision is not Reversed it will stand opposed to Illinois

decisions cited. Therefore the Appellate Courts' decision of this case should not become the law of this State without further review by this Court.

_____

Donald Lee Kren, Petitioner

pro-se

POINTS AND AUTHORITIES

Cases Relied Upon

Chand v. Schlimme, 38 Ill. 2d 469, on page 477 states:

"A party wishing to bring an appeal must, however, wait until the trial court rules on any pending post-trial motions before bringing an appeal. As the rules clearly state, a notice of appeal that a party files before the circuit court has disposed of a timely post-trial motion has no effect".

Marriage of Jones, 187 Ill. App. 3d 206, on page 213 states:

"Thus, we believe that City of Chicago v. Greene is directly applicable to the situation presented here. As the Illinois Supreme Court stated there, "{t}he issues not raised in the defendant's original post-trial motion but raised by the subsequent post-trial motions of the defendant could have been regarded as a supplement or amendment to his original post-trial motion and it was properly within the discretion of the trial court to have allowed * * * such subsequent motions." (Greene, 47 Ill. 2d at 33.) Further, in a hearing on reconsideration, the court may hear additional evidence which might be reason for change in the original order.

Marriage Uphoff, 457 N. E. 2d 426, on

pages 426, 427, and 428 states:

"As long as any party's timely post-trial motion remains undisposed, underlying judgment is not final, notice of appeal is premature, and complete jurisdiction remains in the circuit court, S. H. A. Ch. 110A, Paras. 303, 303(a)." "We find that the circuit court retained jurisdiction to hear the defendants' post-trial motion * * *.' (92 Ill. 2d 530, 543-544, 65 Ill. Dec. 852, 442 N.E. 2d 163.) Since defendant's notice of appeal was filed "within 30 days after the entry of the order disposing of the {post-trial} motion" (87 Ill. 2d R. 303(a)), the notice of appeal was found to be proper."

"Had she filed a notice of appeal prior to the trial court's disposition of defendant's timely post-trial motion, the

notice would have been premature, since no final judgment had been entered."

Bell Federal Savings & Loan v. Bank of Rosewood, 203 Ill. App. 3d 219, on page 223 states:

"The court defaulted Korea, found that Ravenswood had a valid lien for $130,087.44 and **expressly found that there is no just cause for delay in the enforcement of or appeal from this Decree.**" Accordingly, as Ravenswood asserts, the July 11 order was the final and appealable order, and the time to file either a post-trial motion or a notice of appeal commenced to run on July 11, 1986".

Benet Realty Corp. v. Lisle S&L Assn., 175 Ill. App. 3d 227, on page 235 states:

"However, there was still time remaining in which plaintiffs could have filed a post-trial motion attacking the final judgment because 30 days had not yet passed from the September 25, 1987 final judgment. Had plaintiffs filed a timely post-trial motion, attacking the final judgment, the running of the time to file a notice of appeal by either party would have been tolled."

POINTS AND AUTHORITIES

RULES RELIED UPON

ILL. Rev. Stat., Ch. 110, Section 2-1007 reads in part "Extension of Time and Continuances. On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment."

Ill. Rev. Stat., Ch. 110, Section 13-216 Stay of action. When the commencement of an action is stayed by injunction, Order of a Court, or statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Ill. Rev. Stat., Ch. 110A, Section 231(e), Court's own Motion. The court may on its own motion, or with the consent of the adverse party, continue a cause for trial to a later day.

Ill. Rev. Stat., Ch. 110A, Supreme Court Rule 303, Appeals from Final Judgements of the Circuit Courts in Civil Cases in part reads:

> Supreme Court Rule 303. Appeals from Final Judgments of the Circuit Courts in Civil Cases.
>
> (a) Time: Filing: Transmission of copy.
>
> (1) Except as provided in paragraph (b) below, the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the

final judgment appealed from, or, if judgment is filed, whether in a jury or a non-jury case, within 30 days after the entry of the order disposing of the last pending post-trial motion.

(2) When a timely post-trial motion has been filed by any party, whether in a jury case or a non-jury case, a notice of appeal filed before the entry of the order disposing of the last pending post-trial motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal pursuant to Rule 309. This is so whether the timely post-trial motion was filed before or after the date on which the notice of appeal was filed. A new notice of

appeal must be filed within the prescribed time measured from the entry of the order disposing of the post-trial motion, as provided in subparagraph (a)(1) of this rule. No request for reconsideration of a ruling on a post-trial motion will toll the running of the time within which a notice of appeal must be filed under this rule. A party who filed a premature notice of appeal will not be required to pay a filing fee for future appeal in the same case if, at the time of filing the future appeal, he presents the receipt for the fee paid for filing the premature notice of appeal and a copy of the circuit court order dismissing the premature appeal.

(Supreme Court Rule 304). **Appeals From Final Judgements That Do Not Dispose of an Entire Proceeding** in part reads.

> **(Chapter 110-A, Section 304) (a), Judgments As To Fewer Than All Parties or Claims - Necessity for special Finding.** If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an **express written finding that there is no just reason for delaying enforcement or appeal.**
>
> Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for

filing the notice of appeal shall run from the entry of the required finding. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is **not enforceable or appealable** and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

POINTS AND AUTHORITIES

Affidavit

In regard to the new evidence: Affidavits, Advertising, and Probate Records, Contained in Post trial Motion of May 13, 1992.

On first day of trial (April 13, 1992) I, my son Mitchell and many neighbors to 1111 No. Lincoln testified to welding and repairs having been performed at 1111 No. Lincoln, during and after the time of the alleged abatement in 1983 and 1984. In rebuttal, Joseph Fleischli testified falsely that the work he was doing then, in 1983 and 1984, was moving equipment to Otto Boiler. Vol. II pg. 128, 17 through 22. The court believed him, saying at Vol. II, pg 148, 5 through 10, "I am convinced by a preponderance of the evidence that the

non-conforming use did cease, was extinguished in approximately '84 and '85. By the testimony of Mr. Fleischli and because I found that that terminated..."

(a) The Affidavits of Keith Elmore and Joe Lockwood:

I and everyone I knew who was familiar with 'Otto Boiler', believed Ernie Otto owned it until Fleischli's presence there (Otto Boiler) in 1987. Before trial I visited Mr. Otto at his home to ask him when Fleischli became involved with 'Otto Boiler'. Mr. Otto appeared to be infirm, not a well person, and was not willing to discuss the matter.

The sale of 'Otto Boiler' to Keith Elmore by Ernie Otto was not recorded. Fortunately, Post trial publicity made the trial a topic of conversations in which I learned of this un-recorded sale, Keith Elmore and subsequently James Lockwood.

I met Mr. Elmore for the first time on May 12. At that meeting he verified

his prior ownership of 'Otto Boiler', presented me with an affidavit, and directed me to Mr. Lockwood.

Both Elmore (C00189) and Lockwood (C00190) refute Fleischlis' testimony of activities in 1984 through 1985 at 1111 No. Lincoln.

> "Well, I had been trying to move some of that--some of the things that I had out there over to Otto Boiler," (Proceedings Vol. II, page 128, 2 through 19).

(b) The Donnelly Advertising:

The Donnelley Advertising at (C00115 through C00175), (which) confirms the affidavits of both Elmore and Lockwood , (C00189) and (C00190) also discredits Joseph Fleischlis' denial of any commercial activity at 1109-1121 No. Lincoln by his statement (proceedings Vol. II, page 8, 3 and 4) "There was never any commercial--there was never commercially any business in any of those locations." and (proceedings Vol. II, page 7, 9 through 13)

"Q: Was there ever any commercial activity on 1109 through 1121 North Lincoln during the years of 1984 and 1985 or not?

A: I never had ever used that in

a commercial capacity. It was a little hobby shop there and I did some hobby work."

The advertising also confirms Kren in (Proceedings Vol. II p. 90, 9 through 24, and on p. 91, 1 through 8), describing commercial activity at the site.

(c) The Probate Records:

The weight given by the court to the testimony of intentions to abate the **non conforming use variance** by one co-executor, (Joseph Fleishli) with no apparent knowledge or consent of the other co-executor, Anna May Brown, led me to the Probate Court for a check of credentials. From the records at the probate Court I discovered that Joseph Fleischli's status as co-executor was objected to by the other heir and co-executor and more importantly that Joseph Fleischli had paid great utility expenses on the "vacant" property, (Vol. II, page 10, 17 through 19), and wrote more than 371 business checks between February 17, 1983 and August 4, 1986. This reveals that, contrary to sworn testimony by Fleishli, **the property was not vacant** during 1983, 1984, or 1985 and that

business records, (utility bills and a business checking account) did exist for that period. - (C00176-C00186), (Vol.II, page 10, 6 through 19).

These documents, all considered by the court (Vol. III, page 15, 7 through 24, and page 16, 1 through 3), when taken together do reveal that Fleischli was in residence, advertised for, and engaged in commercial activity at 1111 No. Lincoln during 1983 through 1986 and was **at least** mistaken when he said there were no records. (Vol. 2, Page 10, 6 through 8).

Consideration of these documents reveals that there was neither abatement of the non-conforming use at 1111 No. Lincoln during 1983, 1984, or 1985, nor a move to 'Otto Boiler' until after 4 April 1987.

_____ _____

NOTARY PUBLIC Donald Lee Kren,

petitioner

pro-se

Donald Lee Kren
1632 Loveland
Springfield, Illinois
62703
(217) 522-7934

STATEMENT OF

FACTS OF THE CASE

1. That on April 13, 1992, after a bench trial, the trial court dismissed Count II of Plaintiff's complaint, found in favor of the Plaintiff as to Count I, and found in favor of the Defendant on Count III. The action was **continued** to May 5. Additionally, Kren is ordered to have the property in compliance with R 3 Zoning on that date. **No express written finding that there is no just reason for delaying the appeal in docket entry or open court.** Ill. Rev. Stat., Ch. 110A, Section 231(e). Ill. Rev. Stat., Ch. 110A, Section 304(a) (Vol. II Proceedings, pp. 147-155) (C00225).

2. On May 1, 1992, prior to final judgment, Defendant did file a Motion to Reconsider. (C00098-C00102).

3. On May 5, 1992, the Court first Denied the May 1 Motion to Reconsider, then visited the property and in Final Judgement ruled the property in conformance with R 3 zoning and fined Defendant Kren $500.00 on Count One. (C00103)

4. On May 13, 1992, **Upon discovery of new evidence**, Defendant filed a post trial motion requesting a hearing or in the alternative a new trial. (C00104-C00108) (C00226)

5. On May 14, 1992, **Citing new evidence**, Defendant filed a Motion to Vacate Judgment and grant a new trial (C00109)

6. On May 14, 1992, With consent of Defendant, Atty. Kauerauf filed a Motion for Leave to Withdraw. (C00110-C00111)

7. On May 15, 1992, The court set a

hearing for June 2, 1992 on Motions of May 13, May 14. (C00113)

8. On June 1, 1992, With consent of Plaintiff, Defendant with new counsel filed a Motion for Continuance and Leave to File an Amended Motion for a New Trial. (C00187)

9. On June 1, 1992, Plaintiff having no objection,The court ordered that the hearing scheduled for June 2 is cancelled and granted leave to file an amended motion by June 30 to Defendant. Also on June 1, 1992 the $500.00 fine was paid by Defendant. (C00188)

10. On June 30, 1992, Defendant filed an amended motion for a new trial. Attached to this motion is new evidence including Affidavits (C00189, C00190); Advertising (C00115-C00174); Proceedings Vol. II; and

Probate Records (C00175-C00186).

11. On September 8, 1992, the hearing on the amended motion of June 30 for a new trial is set for September 22, 1992. (C00194). Ill. Rev. Stat., Ch. 110, Section 2-1007; ILL. Rev. Stat., Ch. 110A, Section 231(e); Ill. Rev. Stat., Ch. 110, Section 13-216.

12. On September 22, a hearing was held on motions filed on **May 13**, May 14, and Amended Motion of June 30. All motions were denied and parties were advised by the court that this is the **final** ruling. (Proceedings, Vol. III, P. 16) (C00227).

13. On October 22, 1992, Defendant filed a Notice of Appeal. (C00195) Ill. Rev. Stat., Ch. 110A, Section 303(a)(1); Ill. Rev. Stat;., Ch. 110A, Section 304(a).14. On November 11, 1992, the Docketing Order

was entered.

(Appellate Docket sheet)

15. On December 30, 1992, Plaintiff-Appellee filed a Motion to Strike and Dismiss.

(Appellate Docket sheet)

16. On January 5, 1993, the Appellate Court Allowed Appellees' Motion to Strike and Dismiss.

(Appellate Docket sheet)

Appended

17. On January 7, 1993, Appellant Donald Kren filed a Motion to Reconsider [objection to] Order Allowing Appellee's Motion to Strike and Dismiss, this motion was Denied on January 12, 1993.

(Appellate Docket sheet)

18. On January 14, 1993, Appellant Kren filed a Motion to Allow Corrections to Objection to Appellees' Motion to Strike and Dismiss and at the same time filed the Corrected Objection to Appellees' Motion to Strike and Dismiss.

(Appellate Docket sheet)

19. On January 20 the Court Allowed Appellants' Corrections to Objection to Appellees' Motion to Strike and Dismiss, but Overruled Appellant's Corrected Objection to Appellee's Motion to Strike and Dismiss.

(Appellate Docket sheet)

20. On January 26, 1993, Appellant Kren filed a Request to Reconsider or Second Corrected Objection to Plaintiff-Appellee's Motion to Strike and Dismiss.

On February 1, 1993, the Court Denied this request.

(Appellate Docket sheet)

21. On February 11, 1993, within 21 days of the February 1 ruling Denying the petition for rehearing, Appellant Kren filed both an Affidavit of Intent to Petition for Leave to Appeal and Notice of filing same.

(Appellate Docket sheet)

22. On March 2, 1993, within 35 days of the February 1 Ruling Denying the petition for rehearing, Appellant Kren filed this Petition.

ARGUMENT

Since final judgment was issued May 5, Defendants' Post-trial motion of May 13 was timely.

Bell Federal Savings & Loan v. Bank of Rosewood, 203 Ill. App. 3d 219, Benet Realty Corp. v. Lisle S&L Assn., 175 Ill. App. 3d 227, Ill. Rev. Stat., Ch. 110A, Supreme Court Rule 303, (a),1,2.

Defendants' Post-Trial Motion of May 13th. and all subsequent motions were heard September 22, 1992. (C00277)

Marriage Uphoff, 457 N. E. 2d 426, on pages 426, 427, and 428 . Chand v. Schlimme, 38 Ill. 2d 469. Ill. Rev. Stat., Chapter 110-A, Section 304. Ill. Rev. Stat. Chapter 110A, Rule 303

(a),1 and 2. Proceedings Vol. III, PP 14-16.

The Notice of Appeal followed on October 22 1992. (C00195)

Marriage Uphoff, 457 N. E. 2d 426, on pages 426, 427, and 428. Chand v. Schlimme, 38 Ill. 2d 469. Ill. Rev. Stat. Chapter 110A, Rule 303 (a),1 and 2.

But for the new evidence **discovered after May 5**, which resulted in the post trial motion May 13, the appeal could have been initiated before June 5, Ill. Rev. Stat. Chapter 110A, Rule 303 (a),1 and 2.

Not filing the Post-trial motion of May 13 would have denied the Circuit Court the opportunity to hear the new evidence, evidence that Defendant expected to resolve the controversy in

the Circuit Court without involving the Appellate Court.

Marriage of Jones, 187 Ill. App. 3d 206, on page 213.

An appeal after the post trial motion of May 13 would have had no effect as jurisdiction was with the trial court on the post trial motion pending.

Chand v. Schlimme, 38 Ill. 2d 469. Marriage Uphoff, 457 N. E. 2d 426, on pages 426, 427, and 428. Ill. Rev. Stat. Ch. 110A, Rule 303 (a),1 and 2.

Defendant's Post-Trial Motion of May 13 was timely, being entered 30 days after the first day of trial and seven days after final judgment. Defendant does not agree to consideration of this May 13 Motion as a second Post-Trial Motion but rather as an amendment to the only previous (May. 1) Motion, a motion

for reconsideration, which was entered before final judgment. Regardless, the evidence that the Motion of May 13 asked to present was new and vital.

(Greene, 47 Ill. 2d at 33.)
Marriage of Jones, 187 Ill. App. 3d 206.
Benet Realty Corp. v. Lisle S&L Assn.,
175 Ill. App. 3d 227. (C00098-C00102)

The May 13 Motion with the new evidence was considered by the Court at the Hearing on 22 Sept. 1992, and although (it's content was) not convincing to the court, it (the new evidence) was first discovered after final judgment (May 5) and it's Necessity could not reasonably have been anticipated at trial.

(Greene, 47 Ill. 2d at 33.) Benet Realty Corp. v. Lisle S&L Assn., 175 Ill. App. 3d 227. Affidavit page Ill. Rev. Stat Ch. 110, Sec.2-107.. Ill.Rev

Stat. Ch. 110, Sec. 13-216. Ill. Rev. Stat. Ch. 110A, Sec. 231 (e). Ill. Rev. Stat.Ch. 110A, Sec. 304 (a). (C00227) Proceedings Vol. III, pp 14-16.

All court decisions (cited) have held, in cases similar to this one, any appeal prior to disposition of the last timely post-trial motion is a Premature Appeal. This is true, unless the trial court **expressly provides** for piecemeal appeals prior to that judgment (May 5) that disposes of all the matters before the court. There was **no such provision** 13 April 1992. Jurisdiction remains with the court until the last timely post-trial motion is heard. The timely post-trial motion of 13 April was heard 22 Sept. 1992. The appeal in the Appellate court followed on 22 Oct.1992.

Marriage Uphoff, 457 N. E. 2d 426. Bell Federal Savings & Loan

v. Bank of Rosewood, 203 Ill. App. 3d 219, on page 223. Ill. Rev. Stat. Ch. 110A, Rule 303 (a),1 and 2. Ill. Rev. Stat.Ch. 110A, Sec. 304 (a).

Vol. II Proceedings pp. 147-155. (C00225)

All Post (May 5) final judgement motions ran concurrently and were heard and decided each the same day on 22 Sept. 1992. No appeal could be brought with the timely 13 April post trial motion pending. The appeal could only be brought between 23 Sept. and 22 Oct. and was brought (timely)on 22 Oct.

Ill. Rev. Stat. Ch. 110A Rule 303 (a),1 and 2. Ill. Rev. Stat.Ch. 110A, Sec. 304 (a).

PRAYER

Petitioner; Donald Kren, pro-se, Respectfully requests that this Honorable Court Overrule the Appellate Courts Decision allowing Appellees' Motion to Strike and Dismiss, and to Allow the Appeal to Resume and to be considered upon its' merit.

_____

Donald Lee Kren,

Petitioner.

pro-se

Donald Lee Kren
1632 Loveland
Springfield, Illinois
62703
(217) 522-7934

ILLINOIS
CODE OF CIVIL PROCEDURE
AND
RULES OF SUPREME COURT
As Effective January 21, 1988

Chapter 110

Article 2. Civil Practice

Part 6. Pleading

Paragraph 2-612

2-612. Insufficient Pleadings

a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently

define the issues the court may order other pleadings prepared.

b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

c) All defects in pleadings, either in form or substance, not objected to in trial court are waived.

UNITED STATES CODE ANNOTATED

CONSTITUTION

AMENDMENT 14

DUE PROCESS IN GENERAL

1993

Amendment 14, Section 1

I. Generally

1. Historical(in part reads)

The principle that what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process does not freeze due process within confines of historical facts or discredited attitudes since it is of the very nature of a free society to advance in its standards of what is deemed

reasonable and right and, representing as it does a living principle, "due process" is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights. Frank v. State of Md., Md.1959, 79 S.Ct. 804, 359 U.S. 360, 3 L.Ed.2d 877, rehearing denied 79 S.Ct. 1292, 360 U.S. 914, 3 L.Ed.2d 1263.

Looking at this clause prohibiting the deprivation of property without due process of law, it is to be remembered that the provision to that effect appeared in most of the state constitutions long before this amendment was adopted, and that principle was accepted everywhere as vital in the American systems of government, but this amendment, although negative in its words, has the effect to incorporate into the fundamental law of each state a rule

theretofore prescribed by the Constitution of the United States for the General Government and its agencies. Southwestern Oil Co. v. Texas, Tex. 1910, 30 S.Ct. 496, 217 U.S. 114, 54 L.Ed. 688.

In England the requirement of due process of law, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law and the words were declared to be the equivalent of "law of the land." and a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. Missouri Pa. R. Co. v. Homes, Mo.1855, 6

S.Ct. 110, 115 U.S. 512, 29 L.Ed. 463.

2. Construction(in part reads)

The terms "liberty" and "property" in this clause are not to be narrowly construed, but must be given a broad interpretation. Aster v. Board of Ed. of City of New York, 1972, 339 N.Y.S.2d 903, 72 Misc.2d 953.

3. Construction with federal laws generally (in part reads)

Right of individual or corporation not to be deprived of property without due process is "right secured by the Constitution" within 28 U.S.C.A. Sec. 1343 giving district courts original jurisdiction of civil actions authorized by law to be commenced by persons to redress deprivations under color of any

state law or any right secured by Constitution. Joe Louis Milk Co. v. Hershey, D.C.Ill.1965, 243 F.Supp. 351.

15. Purpose(in part reads)

One of basic purposes of this clause is to protect person against having government impose burdens upon him except in accordance with valid laws of the land. Giaccio v. State of Pa., Pa.1966, 86 S.Ct. 518, 382 U.S. 399, 15 L.Ed.2d 447.

The purpose of this clause is not to protect an accused against a proper conviction but against an unfair conviction. Adamson v. People of State of Cal., Cal.1947, 67 S.Ct. 1672, 332 U.S. 46, 91 L.Ed. 1903, rehearing denied 68 S.Ct. 27, 332 U.S. 784, 92 L.Ed. 367.

Protection of individuals against arbitrary government action is the great

purpose of this clause. Wilwording v. Swenson, C.A.Mo.1974, 502 F.2d 844, certiorari denied 95 S.Ct. 835, 420 U.S. 912, 42 L.Ed.2d 843, on remand 405 F.Supp. 447.

18. Law governing(in part reads)

Although interest which is entitled to due process protection is created, in many cases, by state law, issue of when such interest rises to level of constitutionally protected "property interest" or entitlement is a question of federal, not state law. Meeker v. Manning, D.C. Conn.1982, 540 F.Supp. 131.

This clause, rather than state law, defines what process is due. Ruman v. Com. of Pa., Dept. of Revenue, D.C.Pa. 1979, 462 F.Supp. 1355, affirmed 612 F.2d 574, certiorari denied 100 S.Ct. 2939, 446 U.S. 964, 64 L.Ed.2d 823.

Constitution of the United States, rather than state law, defines what process is due once the deprivation of property or liberty has been demonstrated. Bagby v. Beal, D.C.Pa.1977, 439 F.Supp. 1257.

21. Duty of state courts

(in part reads)

State courts bear equal responsibility with federal courts to guard and protect rights secured by Constitution of the United States. Horn v. O'Cheskey, D.C.N.M.1974, 378 F.Supp. 1280.

35. Reasonableness of regulation

(in part reads)

Though vested rights cannot inhibit proper exertion of police power, it must be exercised for an end which is in fact public, and means adopted must be

reasonably adapted to accomplishment of that end, and must not be arbitrary or oppressive. Treigle v. Acme Homestead Ass'n, La.1936, 56 S.Ct.408, 297 U.S. 189, 80 L.Ed. 575.

37. Elements of due process violation generally.

Four essential elements which must be met before due process clause applies are: (1) person must have recognized liberty or property interest at stake; (2) even temporary deprivation of that liberty or property will satisfy required element of due process clause; (3)there must be some form of state action which deprives individual of his liberty or property; and (4) there must be some legitimate governmental or public reason asserted for depriving individual of his liberty or property. Craig v. Carson, D.C.Fla.1978,449 F.Supp.385.

The first prerequisite to raising due process argument is that action complained of must constitute "state" action, and the state action must result in a "deprivation" of complainant's interest, and such interest must be a "property" interest within meaning of due process clause, and finally, if state action deprives one of property interest, court must balance various interests at stake in order to determine the procedural due process which is constitutionally required under circumstances. Pitsenberger v. Pitsenberger 1980, 410 A.2d 1052, 387 Md. 20, appeal dismissed 101 S.Ct. 52, 449 U.S. 807, 66 L.Ed.2d 10, rehearing denied 101 S.Ct. 601, 449 U.S. 1028, 66 L.Ed.2d 491.

II. Standards Or Tests

61. Generally (in part reads)

To justify state in interposing its authority in behalf of public, it must appear first that interest of public requires such interference and second that the means are reasonably necessary for accomplishment of purpose, and not unduly oppressive on individual. Goldblatt v. Town of Hempstead, N.Y., N.Y.1962, 82 S.Ct. 987, 369 U.S. 590, 8L.Ed.2d 138.

In judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to

be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Davidson v. New Orleans, La. 1877, 96 U.S. 107, 6 Otto 107,24L.Ed. 616.

62. Balancing of interests

(in part reads)

Application of the broad restraints of due process compels inquiry into the nature of demand being made upon individual freedom in a particular context and justification of social need on which the demand rests. Frank v. State of Md., Md. 1959, 79 S.Ct. 804, 359 U.S. 360,3 L.Ed.2d 877, rehearing denied 79 S.Ct. 1292, 360 U.S. 914,3 L.Ed.2d 1263.

What is due process in a procedure affecting property interests must be

determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. Anderson Nat. Bank v. Luckett, Ky.1944, 64 S.Ct.599, 321 U.S. 233, 88L.Ed. 692.

In considering kinds of due process protection which might be afforded in given case, nature of affected interest, manner in which it has been adversely affected, reasons for which it was affected and viable alternatives to challenged procedure must be considered, and injury complained of must be balanced against good to be accomplished. Palmer v. Columbia Gas of Ohio, Inc., C.A. Ohio 1973, 479 F.2d 153.

When court acts under this amendment

it must weigh state's interest in the product of this effort against interest of citizen in his constitutional rights, and only if state's interest is overriding and compelling will courts condone an invasion of those rights. Jordan v. Hutcheson, C.A.Va.1963, 323 F.2d 597.

63. Arbitrary or capricious action (in part reads)

Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and solid recognition of the basic values that underlie our society. (Per Mr. Justice Powell with three Justices concurring and one Justice concurring in the judgment.) Moore v. City of East Cleveland, Ohio, Ohio 1977, 97S.Ct. 1932, 431 U.S. 494, 52 L.Ed.2d 531.

Right to substantive due process is a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to object sought to be obtained; test is whether there be a matter touching public interest which merits instant correction at hands of authorities and, if so, that remedy adopted by rulemaking authority be reasonably calculated to correct it. Ingraham v. Wright, C.A.Fla. 1976, 525 F.2d 909, affirmed 97 S.Ct. 1401, 430 U.S. 651, 51 L.Ed.2d 711.

64. Fairness or justice

(in part reads)

Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of

decency and fairness that has been woven by common experience into the fabric of acceptable conduct. Breithaupt v. Abram, N.M. 1957, 77 S.Ct. 408, 352 U>S> 432, 1 L.Ed. 2d 448.

This clause requires that action by state through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions. Buchalter v. People of State of New York, N.Y.1943, 63 S.Ct. 1129, 319 U.S. 427, 87 L.Ed. 1492.

As applied to a criminal trial, denial of "due process of law" is the failure to observe that fundamental fairness essential to the very concept of justice, and in order to declare a denial of it, the Supreme Court must find that the absence of that fairness fatally

infected the trial, and the acts complained of must be of such quality as necessarily prevent a fair trial. Lisenba v. People of State of California, 1941, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, rehearing denied 62 S.Ct. 620, 315 U.S. 826, 86 L.Ed. 1222.

Denial of due process is failure to observe that fundamental fairness essential to very concept of justice. inden v. Dickson, C.A.Cal.1961, 287 F.2d 55.

65. Rational relationship

(in part reads)

"Substantive due process" means that state action, which deprives person of life, liberty or property, must have a rational basis; that reason for deprivation may not be so inadequate that it would be characterized as arbitrary.

Jeffries v. Turkey Run Consol. School Dist., C.A.Ind.1974, 492 F.2d 1.

This clause requires not only that there be a deprivation of property but also some unreasonable or unreasoned imposition of liability. Pearson v. Northeast Airlines, Inc., C.A.N.Y.1962. 309 F.2d 553,certiorari denied 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720.

In cases in which claim of constitutional infringement is based on alleged arbitrary or unequal treatment or invidious discrimination in violation of this clause or equal protection clause, courts apply rational basis test under which discrimination between groups of citizens is permissible unless it is found to be void of any rational basis. Wilson v. Moore, D.C.W.Va.1972, 346 F.Supp.635.

66. Shocking to conscience

General test for identifying conduct that violates due process is to determine whether particular action shocks the conscience. Henderson v. Counts, D.C. Va.1982, 544 F.Supp. 149.

67. Strict scrutiny-Generally

(in part reads)

As with any aspect of substantive due process, a court using irrebuttable presumption doctrine must apply rational basis test, or in appropriate cases, strict scrutiny. Malmed v. Thornburgh, C.A. Pa.1980, 621 F.2d 565, certiorari denied 101 S.Ct. 361, 449 U.S. 955, 66 L.Ed.2d 219.

68. Compelling state interest

(in part reads)

Where individual interest restricted by statute is a fundamental one, the

appropriate test in determining constitutionality of the statute is the compelling state interest test, i.e., is there a compelling need or justification for the state action, by statute or otherwise to override the personal interest asserted. Fain v. Hall, D.C.Fla.1979, 463 F.Supp. 661.

III. RIGHTS PROTECTED

91. Generally(in part reads)

The procedural guarantees of this clause apply whenever the state seeks to remove or significantly alter interests comprehended within meaning of either "liberty" or "property." Paul v. Davis, Ky.1976, 96 S.Ct. 1155, 424 U.S. 693, 47 L.Ed.2d 405, rehearing denied 96 S.Ct. 2194, 425 U.S. 985, 48 L.Ed.2d. 811.

To determine whether due process requirements apply in the first place, court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within this amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, Wis.1972, 92 S.Ct. 2701, 408 U.S. 564, 33 .Ed.2d 548, dissenting opinion 92 S.Ct. 2717, 408 U.S. 593, 33 L.Ed.2d 581.

Unless a plaintiff alleges facts to show that he is demanding procedural safeguards to protect an interest recognized by this amendment, the procedural protections will never come into play. Lipp v. Board of Ed. of City of Chicago, C.A. Ill. 1972, 470 F.2d 802.

Party seeking relief under this clause must establish first, that he has

been deprived by state of "life, liberty or property," and second, that the deprivation occurred without "due process." Wright v. Mahan, D.C.Va.1979, 478 F.Supp.468,affirmed 620 F.2d 296.

Determination of whether there exists violation of procedural due process involves two-stage analysis; it must first be determined whether asserted individual interests are encompassed within this amendment's protection of life, liberty or property, and then if protected interests are implicated, the court must decide what procedures constitute due process of law. U.S. ex rel. Hoss v. Cuyler, D.C.Pa.1978, 452 F.Supp. 256.

92. Basic or fundamental rights

A class of "fundamental" liberties that trigger "substantive" rather than

merely "procedural" protection is defined rather narrowly and, as such, is reserved to those "liberty" or "property" interests that attain status as such under this clause by virtue of the fact that they had been initially recognized and protected by state law. Medina v. Rudman, C.A.N.H.1976, 545 F.2d 244, certiorari denied 98 S.Ct. 266, 434 U.S. 891, 54 L.Ed.2d 177.

93. Vested rights

To be vested right protected by this clause such right must have become a title, legal or equitable, to present or future use and enjoyment of property. U.S. v. Nebo Oil Co., C.A.La.1951, 190 F2d.1003.

95. Liberty

Liberty means more than freedom from servitude, and the constitutional

guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. Smith v. Texas, Tex.1914, 34 S.Ct.681, 233 U.S. 630, 58 L.Ed.1129, Ann.Cas.1915D, 420, L.R.A.1915D,677.

Constitutionally protected liberty interests can be created by state rules or mutually explicit understandings as well as by statute. Bills v. Henderson, C.A. Tenn.1980, 631 F.2d 1287.

96. Property

Property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, Wis.1972, 92 S.Ct. 2701, 408 U.S. 564, 33 L.Ed2d 548, dissenting opinion, concurring opinion 92 S.Ct. 2717, 408 U.S. 593, 33 L.Ed.2d 581.

Any significant taking of property by state is within purview of this clause. Fuentes v. Shevlin, Fla.1972, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d 556, rehearing denied 93 S.Ct. 177,180,409 U.S. 902, 34 L.Ed.2d 1650.

Rights in property are basic civil rights. Lynch v. Household Finance Corp., Conn.1972, 92 S.Ct. 1113, 405 U.S. 538, 31 L.Ed.2d427, rehearing denied 92 S.Ct. 1611, 406 U.S. 911, 31 L.Ed.2d822, on remand 360 F.Supp. 720.

112. Due Process

This clause and the due process

clause of Amend. 5 are directed at the protection of the individual, who is entitled to the immunity thereof as much against the state as against the national government. Curry v. McCanless, Tenn.1939, 59 S.Ct. 900, 307 U.S. 357, 83 L.Ed. 1339.

113. Just compensation for property

Amend. 5 prohibition against taking private property without just compensation applies against the states through Amend 14. Webb's Fabyulous Pharmacies, Inc. v. Beckwith, Fla.1980, 101 S.Ct. 446, 449 U.S. 155, 66 L.Ed.2d 358.

The requirement in Amend. 5 of just compensation for taking of private property for public use applies to the states, and it is incorporated into the meaning of "due process" required by this

amendment. Foster v. City of Detroit, Mich., D.C.Mich 1966, 254 F.Supp.655, affirmed 405 F.2d 138, motion denied 423 F.2d 660.

126. Access to courts-Generally

Part of due process is to guarantee reasonable or meaningful access to courts. Hynes v. Dickson, D.C.Cal.1964, 232 F.Supp.796.

128. Miscellaneous actions preventing access to courts

Refusal of judges to hear and decide a case with the result that the doors of the courts would be closed to the parties because there were no other judges qualified to hear the case could amount to a denial of due process. Atkins v. U.S. 1977, 556 F2d 1028, 214 Ct.Cl. 186, certiorari denied 98 S.Ct. 718, 434 U.S.

1009, 54 L.Ed.2d 751.

130. Good name, reputation, or honor

To constitute deprivation of a liberty interest under this amendment, stigmatizing information must be false and made public by the offending governmental entity. Gentile v. Wallen, C.A.N.Y.1977, 562 F.2d 193.

One's reputation or good name constitutes a cognizable "liberty" interest for purposes of this clause. Connell v. Shoemaker, C.A.Tex.1977, 555 F.2d 483.

This clause applies not only when one's physical liberty is threatened but also where a person's good name, reputation, honor or integrity is at stake. Gotkin v. Miller, C.A.N.Y.1975, 514 F.2d 125.

This clause forbidding state from depriving any person of liberty denotes not merely freedom from bodily restraint but also peripheral benefits, such as freedom from serious damage to one's standing and associations in the community. Paskaly v. Sealel, C.A.Cal.1974, 506 F.2d 1209.

Government's labeling of an individual with a badge of disgrace constitutes a deprivation of "liberty." Collins v. Wolfson, C.A.Fla.1974, 498 F.2d 1100.

In order to establish a property or liberty interest sufficient to implicate this clause's safeguard, the individual must not only be stigmatized but stigmatized in connection with denial of a right or status previously recognized under state law. Equal Employment

Opportunity Commission v. Sears, Roebuck & Co., D.C.Ill.1980,504 F.Supp.241.

Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, motive and an opportunity to be heard are essential. Haines v. Askew, D.C.Fla.1973, 368 F.Supp.369, affirmed 94 S.Ct. 2596, 417 U.S. 901, 41 L.Ed.2d 208.

133. Privacy-General

This clause's protection against arbitrary or unjustifiable state deprivations of personal liberty prevents encroachment upon constitutionally recognized sphere of personal privacy, and protection of liberty under Amend.. 50 from federal intrusion upon privacy sphere is no less comprehensive. U.S. v. Hubbard, 1980, 650 F.2d 293, 208

U.S.Appp.D.C.399.

Basis of right of privacy is right to be let alone. Tureen v. Equifax, Inc., C.A. Mo.1978, 571 F.2d 411.

If what United States Supreme Court itself has termed right of "personal privacy" means anything, it should safely encompass individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting person as one's personality, self-image, and indeed, one's very identity. ben-Shalom v. Secretary of Army, D.C. Wis.1980, 489 F.Supp.964.

V. METHODS OF DEPRIVATION-GENERALLY

325. Defamations, libel, or slander by state officials

A carefully conceived scheme of suggestion and innuendo may be all the more devastating to individual liberty because it is more difficult to refute, especially when its architects sit in the highest office of local government and, hence, to show that allegedly false and stigmatizing charges were made, one claiming deprivation of the constitutionally protected liberty interest may prevail on showing of dissemination of a false and defamatory impression and is not required to establish a detailed bill of particulars. Quinn v. Syracuse Model Neighborhood Corp., C.A.N.Y.1980, 613 F2d 438.

Although defamation by government official, standing alone, does not work deprivation of liberty protected by this amendment, governmental action altering right or status previously held under

state law combined with injury resulting from defamation justified invocation of procedural safeguards. Rodriquez de Quinonez v. Peres, C.A. Puerto Rico1979, 596F2d 486, certiorari denied 100 S.Ct. 78, 444 U.S. 840, 62 L.Ed.2d 51.

VI. METHODS OF DEPRIVATION-ADMINISTRATIVE RULES AND REGULATIONS

351. Generally

Due process questions under Federal Constitution my be presented either by failure of state to follow its own rules of law or by state rules of law serving as a deprivation of due process. Field v. Boyle, C.A.Ill.1974, 503 F.2d 774.